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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT SEATTLE

10 OREGON POTATO COMPANY,

11                   Plaintiff,

12                   v.

13 SEVEN STARS FRUIT COMPANY,  
14 LLC, et al.,

15                   Defendants.

CASE NO. C12-0931JLR

ORDER GRANTING IN PART  
AND DENYING IN PART  
OREGON POTATO COMPANY'S  
MOTION FOR SUMMARY  
JUDGMENT

16                   I.       INTRODUCTION

17       Before the court is Plaintiff Oregon Potato Company's ("OPC") motion for  
18 summary judgment under the Perishable Agricultural Commodities Act ("PACA"), 7  
19 U.S.C. § 499a *et seq.*, against Defendant Seven Stars Fruit Company, LLC ("Seven  
20 Stars") and its sole and managing member, Defendant Monte Maberry (Dkt. 25). The  
21 court has considered the motion, all submissions filed in support and opposition thereto,  
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1 the balance of the record, and the applicable law. Being fully advised, the court  
 2 GRANTS in part and DENIES in part OPC's motion.<sup>1</sup>

## 3 II. BACKGROUND

4 OPC is in the business of selling and shipping agricultural commodities  
 5 throughout the United States and internationally. (Compl. (Dkt. # 1) ¶ 2.1; Answer  
 6 (Dkt. # 21) ¶ 2.1 (admitting allegation based on information and belief).) Between  
 7 November 2011 and May 2012, OPC sold and delivered perishable agricultural  
 8 commodities, namely, blueberries and raspberries, to Seven Stars, shipping the berries  
 9 according to Seven Star's instructions either to Seven Stars' cold storage in Lynden,  
 10 Washington (where Seven Stars is headquartered) or to specific customers designated by  
 11 Seven Stars. (Compl. ¶ 2.4; Answer ¶ 2.4; 6/6/12 Evens Decl. (Dkt. # 5-1) ¶ 3.) During  
 12 this period of time, OPC asserts that it shipped a total of \$2,418,322.30 worth of  
 13 blueberries and raspberries to Seven Stars. (6/6/12 Evens Decl. ¶ 3.) Some of the berries  
 14 that OPC shipped to Seven Stars were purchased from South America. (6/6/12 Evens  
 15 Decl. ¶ 3.)

16 OPC sent invoices to Seven Stars for each shipment of berries at issue. (*Id.* ¶ 4,  
 17 Ex. A.) OPC has provided bills of lading that correspond to most, but not all, of the  
 18 invoices.<sup>2</sup> (*See id.* Ex. A.) The court has identified a corresponding bill of lading for the  
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20       <sup>1</sup> No party has requested oral argument, and the court deems this motion appropriate for  
 21 disposition without it.

22       <sup>2</sup> OPC provided copies of the various invoices at issue here, along with most of the  
 corresponding bills of lading, in one lump exhibit. (*See* 6/6/12 Evens Decl. Ex. A.) In the

1 following invoices: 1137844, 1138308, 1139042, 1239165, 1239118, 1239267, 1239342,  
 2 1239343, 1239041, 1239972, and 1239973. (*See id.*) The court has not identified any  
 3 corresponding bill of lading for the following invoices: 1240327 (for \$132.30) and  
 4 1242830 (for \$815,518.00.) (*See id.*) In addition, although it appears that OPC has  
 5 submitted a bill of lading intended to correspond to invoice number 1138730, there are  
 6 peculiarities about the bill of lading that no party has explained. Specifically, invoice  
 7 number 1138730 indicates that the specified berries are to be “ship[ped] to” Star Frozen  
 8 Foods in Port Ludlow. (*Id.* Ex. A at 37.) However, the apparent corresponding bill of  
 9 lading indicates that the berries were shipped to Fruitade International in Toronto,  
 10 Canada. (*Id.* at 38.) The court could find no explanation for this apparent discrepancy in  
 11 the factual record or in the parties’ briefing.<sup>3</sup>

12 Defendants have admitted that Seven Stars “has not paid all amounts due and  
 13 owing on the ordered products.” (Answer ¶ 2.4.) When OPC did not receive payment  
 14 with respect to the foregoing invoices, Ms. Diana Evens, the accounts receivables  
 15 manager of OPC, Mr. Frank Tiegs, the President of OPC, and others began contacting  
 16 Mr. Maberry, the owner and manager of Seven Stars. (6/6/12 Evens Decl. ¶ 5; 6/6/12  
 17 Tiegs Decl. (Dkt. # 5-2) ¶¶ 3-5.) Mr. Maberry assured OPC staff that payment from  
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19 future, the court expects the parties to provide tabs, dividers, or some other form of organization  
 20 that will enable it to more easily identify and locate pertinent documents and evidence.

21       <sup>3</sup> The invoices at issue specify that payment is to be made within 30 days of the “B/L  
 Date,” or the bill of lading date. (6/6/12 Evens Decl. ¶ 4, Ex. A.) The invoices with  
 22 corresponding bills of lading bear the same date as the corresponding bill of lading. (*See id.*)

1 Seven Stars would be forthcoming. (6/6/12 Evens Decl. ¶ 5; 6/6/12 Tiegs Decl. ¶ 5.)  
2 OPC contacted some of Seven Stars' customers, who advised OPC that they paid for the  
3 delivery of berries shipped to them from OPC on Seven Stars' account. (6/6/12 Evens  
4 Decl. ¶ 9.)

5 On May 31, 2012, OPC initiated the present action against Seven Stars and Mr.  
6 Maberry under PACA, 7 U.S.C. § 499e(c)(5). (*See generally* Compl.) On June 18, 2012,  
7 the court issued a temporary restraining order against both Seven Stars and Mr. Maberry.  
8 (*See* 6/18/12 Order (Dkt. # 10).) On July 11, 2012, the court converted its temporary  
9 restraining order into a preliminary injunction. (*See* 7/11/12 Order (Dkt. # 16).)

10 On November 16, 2012, OPC moved for summary judgment with respect to its  
11 PACA and other claims. (*See generally* Mot.) Over time, OPC has received partial  
12 payments from Seven Stars, totaling at least \$713,612.78, with respect to the overdue  
13 invoices. (*See* 6/6/12 Evens Decl. ¶ 3; 6/6/12 Tiegs Decl. ¶ 6; 11/16/12 Evens Decl.  
14 (Dkt. # 25-1) ¶ 4, Ex. at 2.) In addition, OPC has credited Seven Stars for \$157,677.00 as  
15 a result of the return of some frozen blueberries and \$105,784.87 as a partial settlement  
16 with Seven Stars with respect to some frozen raspberry puree. (*See* 11/16/12 Evens Decl.  
17 ¶ 4, Ex.; *see generally* Tippett Decl. (Dkt. # 25-2).) As a result of the foregoing partial  
18 payments and other adjustments, OPC stated in its motion for summary judgment that  
19 Seven Stars owed a total of \$1,441,337.65 for the shipments of perishable agricultural  
20 goods at issue. (Mot. at 3; 11/16/12 Evens Decl. ¶ 5.)

21 In addition to its PACA claim, OPC also asserted a breach of contract claim.  
22 (Mot. at 10.) The terms of OPC's invoices provide for 1.5% interest on unpaid balances

1 and reasonable attorney's fees for collection costs. (6/6/12 Evens Decl. Ex. A at 6-7.)  
2 Accordingly, OPC sought the recovery of \$256,948.72 in interest. (Mot. at 10.) In  
3 addition, OPC sought \$42,061.30 in attorney's fees. (*Id.* at 12; *see generally* 11/15/12  
4 BergDahl Decl. (Dkt. # 25-3); Cameron Decl. (Dkt. # 25-4).)

5 In response to OPC's motion for summary judgment, Defendants do not dispute  
6 that they owe a significant sum to OPC. (*See* Answer ¶ 2.4 ("Defendants admit that . . .  
7 Defendant Seven Stars has not paid all amounts due and owing on the ordered  
8 products.")) Rather, Defendants assert that "there is a material issue of fact . . . on how  
9 much product was shipped by Plaintiff, and therefore how much is owed on [OPC's]  
10 PACA and breach of contract claims." (Resp. (Dkt. # 26) at 2.) First, Defendants assert  
11 that there are a number billing errors with respect to OPC's invoices. For example,  
12 Defendants assert that OPC failed to credit Seven Stars for a recent payment of  
13 \$12,187.13. (*Id.*) Defendants also assert that there is a total discrepancy of \$65,260.00  
14 with respect to Invoice Nos. 1139042 (\$31,590.00), 1138730 (\$29,970.00), and 1239165  
15 (\$3,700.00) because OPC charged Seven Stars based on the "gross weight" of the  
16 shipment rather than the "net weight." (*Id.* at 3; 12/7/12 Maberry Decl. (Dkt. # 27) ¶ 5.)  
17 In addition, Defendants assert that there is an overcharge of \$62,715.00 on Invoice No.  
18 1239165 due to a re-pack of the product which usually results in a loss of five to ten  
19 percent (5-10%) of the product. (Resp. at 4; 12/7/12 Maberry Decl. ¶ 6.)

20 Second, Defendants point out that OPC failed to provide a "corresponding bill of  
21 lading or other confirming documents" with respect to Invoice No. 1242830 that would  
22 demonstrate that 858,440 pounds of raspberries invoiced at \$815,518.00 were actually

1 shipped or received by Seven Stars. (Resp. at 2-3.) Although Defendants acknowledge  
2 that the quantity they received “is probably close,” they assert that OPC’s number is not  
3 correct. (*Id.* at 3.) Mr. Maberry provides testimony that “[t]he total quantity listed on the  
4 invoice does not seem consistent with the quantity associated with this order because it is  
5 not consistent with what would be transported in containers.” (12/7/12 Maberry Decl.  
6 ¶ 4.) Although he “believe[s] that the pounds referenced in the invoice are in the  
7 ballpark,” he does not believe the invoice “is an accurate representation of the actual  
8 number of pounds of raspberries delivered.” (*Id.*)

9 Finally, Defendants seek an opportunity to complete discovery prior to the court’s  
10 consideration of OPC’s motion under Federal Rule of Civil Procedure 56(d). (Resp. at  
11 4.) Mr. Maberry testifies that “[i]n order . . . to confirm the accuracy of the invoices  
12 provided by OPC,” he “need[s] to get a copy of the Sales Memos and the delivery  
13 information on the raspberries.” (12/7/12 Maberry Decl. ¶ 7.) He also asserts that he has  
14 “not been provided with all the shipping records related to the raspberry product.” (*Id.*)  
15 Thus, he asserts that he cannot ascertain the necessary facts concerning the invoice  
16 discrepancies referenced above or with respect to the delivery of the raspberries “without  
17 completing discovery.” (*Id.*) Defendants served OPC with discovery requests on  
18 December 10, 2012. (*See* Reply at 7.) The discovery cutoff is not until March 11, 2013.  
19 (*See* Min. Ord. (Dkt. # 24) at 1.)

20 In its reply, OPC denies that there is any discrepancy with respect to the delivery  
21 of the 858,440 pounds of raspberries (12/13/12 Bergdahl Decl. (Dkt. # 30-1) ¶ 3), but  
22 admits that “Maberry is correct in that some of the invoices have minor errors.” (Reply

1 (Dkt. # 30) at 1.) In recognition of those “minor” errors, OPC issued a credit  
2 memorandum for Invoice No. 1139042 in the amount of \$31,833.00 (12/13/12 Bergdahl  
3 Decl. ¶ 4 & n.2), which is slightly in excess of the amount that Defendants asserted was  
4 overcharged due to the use of “gross weight” on the shipment. OPC also issued a credit  
5 memorandum for Invoice No. 1138730 in the amount of \$30,213.00 (*id.* ¶ 4 & n.1),  
6 which again is slightly more than the overcharge claimed by Defendants. OPC, however,  
7 asserts that there is no overcharge due to the use of “gross weight” with respect to Invoice  
8 No. 1239165. (*Id.* ¶ 4.) Nevertheless, OPC acknowledges that “Mr. Maberry is correct  
9 that ‘33,900 pounds [of . . . Blueberries] is [sic] still in OPC’s possession at the cold  
10 storage’ under [I]nvoice No. 1239165.” (*Id.* ¶ 5.) Accordingly, OPC issued another  
11 credit memorandum for \$62,715.00 with respect to this invoice (*id.*), which is the precise  
12 amount of the overcharge asserted by Defendants. Finally, although OPC has submitted  
13 no evidence in this regard, it represents in its reply brief that it issued an additional credit  
14 memorandum in the amount of \$13,515.00 to Seven Stars. (Reply at 3.)

15 Accordingly, following all of the adjustments in OPC’s reply memorandum and  
16 accompanying declarations, OPC now seeks a judgment under PACA of \$1,303,016.65  
17 (Reply at 8), which represents a downward adjustment of \$138,321.00 from the amount  
18 originally asserted in its motion. In addition, OPC has also adjusted its demand for  
19 interest down from \$256,948.72 to \$234,544.50, but increased its demand for attorney’s  
20 fees from \$24,061.30 to \$47,066.30. (Reply at 8; 12/14/12 Cameron Decl. (Dkt. # 30-2).)

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### III. ANALYSIS

#### **A. Standards for Summary Judgment**

Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of showing there is no genuine issue of material fact and that he or she is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her burden, then the non-moving party “must make a showing sufficient to establish a genuine dispute of material fact regarding the existence of the essential elements of his case that he must prove at trial” in order to withstand summary judgment. *Galen*, 477 F.3d at 658.

#### **B. PACA Trust**

“PACA was enacted in 1930 to ‘suppress unfair and fraudulent practices in the marketing of fruits and vegetables in interstate and foreign commerce’ and ‘provides a code of fair play . . . and aid to [agricultural] traders in enforcing their contracts.’”

*C & G Farms, Inc. v. Capstone Business Credit, LLC*, No. CV F 09–0032 LJO SKO, 2011 WL 677487, at \*5 (E.D. Cal. Feb. 17, 2011) (quoting 7 C.F.R. Part 46, Fed.Reg. 45735, 45737 (Nov. 20, 1984)) (alterations in original). Under PACA, commission merchants, dealers, and brokers hold produce and any receivables from the sale of produce in trust for the benefit of unpaid produce suppliers until full payment has been made to the supplier. 7 U.S.C. § 499e(c)(2).

1 Under section 499e(c), perishable agricultural commodities, inventories of food or  
 2 other derivative products, and any receivables or proceeds from the sale of such  
 3 commodities or products, are to be held in “a non-segregated floating trust” for the  
 4 benefit of unpaid sellers. *Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222  
 5 F.3d 132, 136 (3rd Cir. 2000). By the express language of PACA, the trust applies to the  
 6 receivables generated by the sale of commodities, just as it does to the commodities  
 7 themselves. *Boulder Fruit Exp. & Heger Organic Farm Sales v. Transp. Factoring, Inc.*,  
 8 251 F.3d 1268, 1270-71 (9th Cir. 2001).

9 A claimant must establish five elements to recover for unpaid accounts under the  
 10 PACA statutory trust provisions: (1) the produce in question are “perishable agricultural  
 11 commodities”; (2) the produce were received by a commission merchant, dealer, or  
 12 broker; (3) the transaction occurred in contemplation of interstate or foreign commerce;  
 13 (4) the purchaser failed to pay fully and promptly; and (5) the seller preserved its trust  
 14 rights by giving proper notice to the buyer.<sup>4</sup> See 7 U.S.C. § 499e; see also *Weeks v.*  
 15 *Fresh-Pic Produce Co., Inc.*, No. 08cv02058 BTM (WVG), 2012 WL 1815648, at \*1  
 16 (S.D. Cal. May 17, 2012) (citing *C & G Farms, Inc. v. Capstone Bus. Credit, LLC*, No.  
 17 CV F 09–0032, 2011 WL 677487, at \*5–8 (E.D. Cal. Feb 17, 2011)); *Wahluke Produce*,

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19 <sup>4</sup> “Under PACA, notice may be provided in one of two forms: (1) written notice within  
 20 thirty calendar days after payment was due, 7 U.S.C. § 499e(c)(3) (‘the written payment  
 21 method’), or (2) a printed statement on its regular invoices, 7 U.S.C. § 499e(c)(4) (‘the invoice  
 22 method’).” *Belleza Fruit, Inc. v. Suffolk Banana Co., Inc.*, No. CV-12-3033(SJF)(WDW), 2012  
 WL 2675066, at \*7 (E.D.N.Y. July 5, 2012) (quoting *DiMare Homestead, Inc. v. Alphas Co. of  
 N.Y.*, No. 09 Civ. 6644, 2011 WL 2988629, at \*3 (S.D.N.Y. July 22, 2011)); see also 7 C.F.R. §  
 46.46(f).

1   | *Inc. v. Guerra Mktg. Int'l, Inc.*, No. 1:11-cv-1981 LJO-BAM, 2012 WL 1601876, at \*3  
 2   | (E.D. Cal. May 7, 2012).

3                 There is no dispute with respect to several of these elements. No party disputes  
 4   the first element—that the blueberries and raspberries at issue constitute “perishable  
 5   agricultural commodities” under PACA.<sup>5</sup> Further, there is no genuine issue of material  
 6   fact concerning the last element—that OPC preserved its trust rights by including  
 7   statutory language referencing the trust on its invoices. OPC submitted competent  
 8   evidence that its invoices contained the required statutory language (*see generally* 6/6/12  
 9   Evens Decl. Ex. A), and Defendants have produced no evidence or raised any argument  
 10   disputing it.

11                 There is also no dispute with respect to the third element—whether the  
 12   transactions occurred in contemplation of interstate or foreign commerce. Under PACA,  
 13   a transaction implicates “interstate or foreign commerce” if commodities transported  
 14   pursuant to that transaction originate in one state (or foreign country) with the  
 15   expectation that they will end their transit, after purchase, in another. 7 U.S.C.  
 16   § 499a(b)(8). This language is deliberately broad, and a PACA plaintiff does not have to  
 17   prove that the produce actually crossed state lines. *C & G Farms*, 2011 WL 677487, at  
 18   \*8 (citing *In re Southland + Keystone*, 132 B.R. 632, 640-41 (9th Cir. B.A.P. 1991)).

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 20                 <sup>5</sup> Defendants also have admitted that Seven Stars traded in perishable agricultural  
 21   products and was properly licensed or subject to licensing. (See Compl. ¶ 2.2 (“... Seven Stars  
 22   is and was at all time relevant engaged in the business of purchasing and selling perishable  
 22   agricultural commodities, and was licensed or subject to licensure by the USDA [United States  
 22   Department of Agriculture] as a dealer of perishable agricultural commodities.”); Answer ¶ 2.2  
 22   (“Defendants admit paragraph 2.2”).)

1 The court in *In re Southland + Keystone* reasoned that PACA covered all transactions  
2 between a debtor and a seller where “the commodities involved are the type typically sold  
3 in interstate commerce” and where the seller involved is “the type that Congress intended  
4 to protect by implementing PACA.” 132 B.R. at 641. OPC has provided testimony that  
5 at least some of the berries at issue originated in South America (6/6/12 Evens Decl. ¶ 3),  
6 and Defendants have not disputed it. OPC’s evidence is sufficient to meet this third  
7 element.

8       The elements that are at issue are two and four—delivery and failure to pay.

9 Defendants have admitted these elements, but only up to a point. They admit that  
10 “between November 2011 and May 2012, [OPC] sold and delivered some of the  
11 perishable agricultural commodities order by . . . Seven Stars and that [OPC] has not paid  
12 all amounts due and owing on the ordered products.” (Answer ¶ 2.4; *see also id.* ¶ 5.1  
13 (Defendants admit that . . . Seven Stars has not paid all amounts alleged by Plaintiff to be  
14 due and owning for product sold and delivered, and that at least some payments are past  
15 due.”); *see also id.* ¶ 3.1.) Defendants also “admit that some of the product purchased  
16 from [OPC] has been sold, and receipts from such resales disbursed.” (*Id.* ¶ 2.8; *see also*  
17 *id.* ¶¶ 2.9, 5.2.)

18       Yet, despite these general admissions, Defendants have provided evidence  
19 disputing (1) the charges contained in several of the invoices (specifically, Invoices Nos.  
20 1139042, 1138730, and 1239165) (Maberry Decl. ¶¶ 5-6), (2) the amount of berries  
21 delivered under another invoice (*id.* ¶ 4), and (3) the proper crediting of Seven Stars’  
22 account with regard to certain payments (*see* Resp. at 2; Reply at 3). Thus, although all

1 of the elements with respect to breach of the PACA trust have been met, what remains is  
2 a genuine issue of material fact with respect to the quantification of OPC's damages.

3 Significantly, OPC has admitted that Seven Stars was correct with respect to a  
4 significant number (although not all) of the errors that Seven Stars identified in its  
5 responsive memorandum and accompanying declaration, and OPC adjusted some of the  
6 amounts it was demanding in its motion for summary judgment accordingly. (*See*  
7 *generally* Reply.) Thus, Seven Stars has raised a genuine issue of material fact with  
8 respect to those items that remain in dispute, and has also cast doubt on the remaining  
9 accounting and documentation provided by OPC with respect to quantification of both  
10 delivery and payment. Although Seven Stars has admitted to the delivery of some  
11 amount of perishable agricultural products and its failure to pay for some portion thereof,  
12 the court declines to quantify these amounts based on the record described above.

13 Moreover, Defendants have not only identified significant accounting errors in the  
14 materials submitted by OPC, they have requested that they be permitted to complete  
15 discovery before they are required to fully respond to OPC's motion pursuant to Federal  
16 Rule of Civil Procedure 56(d). (Resp. at 4 ("[T]he Motion for Summary Judgment  
17 should be continued to allow for this reasonably necessary discovery, pursuant to Fed. R.  
18 Civ. P. 56(d)."); Maberry Decl. ¶ 7 ("I cannot present these facts without completing  
19 discovery to OPC because the Sales Memos that I had were on a computer that has  
20 crashed, and OPC has not provided me with another copy despite numerous requests.").)

21 Under Federal Rule of Civil Procedure 56(d), if the nonmoving party "shows by  
22 affidavit or declaration that, for specified reasons, it cannot present facts essential to

1 || justify its opposition, the court may: (1) defer considering the motion or deny it; (2)  
2 || allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other  
3 || appropriate order.” Fed. R. Civ. P. 56(d). Relief may be denied, however, if the moving  
4 || party has not acted diligently in pursuing discovery before summary judgment. *Meaux v.*  
5 || *Nw Airlines, Inc.*, No. 11-15480, 2012 WL 3091042, at \*1 (9th Cir. July 31, 2012)  
6 || (unpublished) (citing *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*,  
7 || 525 F.3d 822, 827-28 (9th Cir. 2008)). The court agrees that Defendants are entitled to  
8 || discovery under Rule 56(d). Even without the requested discovery, Defendants have  
9 || identified numerous errors in OPC’s accounting and records. Based on this track record,  
10 || additional discovery is warranted to ensure no further errors and that the court has a full  
11 || record on which to make its ruling.

12       Further, there is no evidence of delay on the part of Defendants with respect to  
13 || discovery. The discovery cutoff does not occur until March 11, 2013. (Min. Ord. at 1.)  
14 || Defendants served their discovery requests upon OPC more than three months in advance  
15 || of this deadline. (Reply at 7.) Based on the record before the court, Defendants are  
16 || entitled to complete the discovery they have issued prior to responding to OPC’s motion  
17 || with respect to its PACA trust claim. Accordingly, the court DENIES this portion of  
18 || OPC’s motion for summary judgment, but without prejudice to timely re-filing following  
19 || completion of the discovery that Defendants have issued.

20       **C. Breach of Contract**

21       OPC also asserts a claim for breach of contract and seeks summary judgment with  
22 || respect to this claim as well. (Mot. at 10.) The court declines to rule on this claim for the

1 same reasons it declines to rule on OPC's PACA claim. In addition, for the same reasons  
 2 that Defendants are entitled to complete their outstanding discovery under Rule 56(d)  
 3 with respect to OPC's PACA claim, Defendants are entitled to complete their outstanding  
 4 discovery with respect to this claim as well. Although the court DENIES OPC's motion  
 5 for summary judgment with respect to its claim for breach of contract, the court's denial  
 6 is without prejudice to timely re-filing following completion of Defendants' Rule 56(d)  
 7 discovery.<sup>6</sup>

8       **D. Mr. Maberry's Personal Liability**

9           OPC also seeks a ruling on summary judgment that Mr. Maberry may be held  
 10 secondarily liable for Seven Stars' breach of the PACA trust because he controlled Seven  
 11 Stars. (*See* Mot. at 7-10.) Defendants have not requested any additional discovery with  
 12 respect to the issue of Mr. Maberry's personal liability, and the court does not find that  
 13 additional discovery is required under Rule 56(d). Accordingly, the court will consider  
 14 this aspect of OPC's motion.

15           As noted above, there is no dispute that Seven Stars has breached its PACA trust.  
 16 Indeed, Defendants admit that OPC "sold and delivered some of the perishable  
 17 agricultural commodities ordered by . . . Seven Stars and that . . . Seven Stars has not paid  
 18 all amounts due and owing on the ordered products." (Answer ¶ 2.4.) The only dispute  
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20           <sup>6</sup> The court also defers ruling on OPC's request for interest and attorney's fees (*see* Mot.  
 21 at 10-13) until such time as OPC re-files its motion for summary judgment with respect to its  
 22 breach of contract or PACA claims or the matter comes to trial. Finally, OPC also seeks an  
 injunction. (Mot. at 13-14.) The court will also defer ruling on this portion of OPC's motion,  
 but notes that the preliminary injunction remains in place. (*See* 7/11/12 Order.)

1 that remains is with respect to the exact quantity of berries delivered and the amount of  
2 unpaid invoices. (*See supra* § III.B.) The issue OPC asks the court to resolve is whether  
3 Mr. Maberry may be held secondarily liable for Seven Stars' breach of the trust. (Mot. at  
4 7-10.)

5 In *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280 (9th Cir. 1997), the Ninth Circuit  
6 found that individuals associated with corporate defendants may be liable under a PACA  
7 trust theory. *Id.* at 282-83. After surveying decisions concerning individual liability  
8 under a PACA trust claim, the Court stated:

9 The unanimous conclusion of the cases is that PACA liability attaches first  
10 to the licensed seller of perishable agricultural commodities. If the seller's  
11 assets are insufficient to satisfy the liability, others may be found  
secondarily liable if they had some role in causing the corporate trustee to  
commit the breach of trust.

12 We agree that individual shareholders, officers, or directors of a corporation  
13 who are in a position to control PACA trust assets, and who breach their  
fiduciary duty to preserve those assets, may be held personally liable under  
the Act.

14 *Id.* at 283 (citations and internal quotations omitted). A court considering the liability of  
15 an allegedly controlling person may look at the closely-held nature of the corporation, the  
16 person's active management role, and any evidence of the person acting for the  
17 corporation. *Id.*

18 There is no dispute that Mr. Maberry is the managing and only member of Seven  
19 Stars, which is a limited liability company. (7/16/12 Maberry Decl. (Dkt. # 17) ¶ 1 at 1;  
20 *see Answer* ¶ 2.4.) In fact, Mr. Maberry's signature is the only one that appears on any  
21 check from Seven Stars that was submitted into evidence by his attorney as a part of  
22

1 Seven Stars' 2012 bank account records. (*See* Lee Aff. (Dkt. # 28) Ex. A at 3, 6, 9, 13,  
2 16, 19.) There is no evidence that any other person, other than Mr. Maberry, directed the  
3 actions or decisions of Seven Stars. Although the Ninth Circuit's decision in *Sunkist*  
4 *Growers* dealt specifically with a corporation rather than a limited liability company, the  
5 court finds no reasoned basis for distinguishing its rationale here.

6 Based on out-of-circuit authority, Defendants nevertheless urge the court not to  
7 impose secondary personal liability on Mr. Maberry for dissipation of the PACA trust  
8 assets. (Resp. at 5.) Given the Ninth Circuit's ruling in *Sunkist Growers*, however,  
9 Defendants acknowledge that such an outcome "would be difficult." (*Id.* at 6.) The court  
10 agrees. Based on the record of Mr. Maberry's exclusive control of Seven Stars, *Sunkist*  
11 *Growers* compels the court to rule that Mr. Maberry is secondarily liable for Seven Stars'  
12 breach of the PACA trust.

13 **IV. CONCLUSION**

14 Based on the foregoing, the court GRANTS in part and DENIES in part OPC's  
15 motion for summary judgment (Dkt. # 25). Although undisputed evidence establishes  
16 that Seven Stars breached the PACA trust, both the quantity of berries delivered and the  
17 amount of unpaid invoices remains in dispute. Further, Defendants have established that  
18 they are entitled to discovery on these issues under Federal Rule of Evidence 56(d).  
19 Accordingly, the court DENIES OPC's motion for summary judgment with respect to its  
20 PACA trust and breach of contract claims, but without prejudice to timely re-filing once  
21 Defendants' Rule 56(d) discovery is complete. The court, however, GRANTS OPC's  
22

1 motion with respect to the secondary liability of Mr. Maberry for Seven Stars' breach of  
2 the PACA trust as discussed above.

3 Dated this 18th day of January, 2013.

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7 JAMES L. ROBART  
8 United States District Judge  
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